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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 522

UNITED STATES *ex rel.* GEORGE E. THOMPSON,
Petitioner,

vs.

WILLIAM LENNOX, Sheriff of Philadelphia,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATE OF NEW JERSEY, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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BRIEF OF THE STATE OF NEW JERSEY, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Statement of the Case

The State of New Jersey files this brief as *amicus curiae* in support of the petition of George E. Thompson for a writ of certiorari to the United States Court of Appeals for the Third Circuit which affirmed an order of the District Court for the Eastern District of Pennsylvania discharging a writ of habeas corpus. The petitioner Thomp-

son is an employee of the federal government at the Philadelphia Navy Yard on League Island. The Navy Yard abuts on the Delaware River immediately across from New Jersey. The petitioner Thompson is a resident and domiciliary of New Jersey. He travels from New Jersey to the Navy Yard on a special ferry and at no time enters the City of Philadelphia, other than the Navy Yard area, in the course of his employment or in travelling between his home in New Jersey and League Island.

The Navy Yard area was ceded to the federal government by the Commonwealth of Pennsylvania. Act of April 4, 1866, P.L. 96; 74 Purd. Stat., §1, note. Congress authorized the acceptance of exclusive jurisdiction over League Island by Act of February 18, 1867, 14 Stat. 396. Pennsylvania ceded League Island to the United States with the single reservation that "all process, civil and criminal of the Commonwealth of Pennsylvania shall extend into, and be effectual within the territory hereby ceded, as if this law had been not passed."* Today the Philadelphia Navy Yard is a complex of naval facilities controlled exclusively by the federal government, with the single exception of the authority reserved to Pennsylvania to serve civil and criminal process.

The City of Philadelphia by ordinance imposes a tax on income earned by all persons employed in Philadelphia and without regard to the state of their domicile. The penalty section of the ordinance provides that any person who fails or refuses to file a return or to pay the tax is

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* In *Fort Leavenworth R.R. Co.* v. *Lowe*, 114 U. S. 525 (1885), the Supreme Court of the United States, in explaining the meaning of a reservation such as this, indicated, "'It provides only that civil and criminal process issued under the authority of the state, which must, of course, be for acts done within and cognizable by the state, may be executed within the ceded lands, notwithstanding the cession.'" At 534.

subject to maximum penalties of $500.00 and 90 days' imprisonment for each offense. The civil process for arrest in penalty actions is by writ of *capias ad respondendum*. 12 Purd. Stat. §257. The petitioner Thompson filed no tax returns for the years 1950 to 1956. On October 9, 1957, the Sheriff of Philadelphia executed a *capias* against the petitioner within the confines of the Navy Yard, thus initiating a penalty action for $100.00 per year or a total of $700.00 in the Municipal Court of Philadelphia. Pennsylvania law forbids resort to the process of arrest to initiate an action of debt for the tax itself. Rule of Civil Procedure 1481 (a), (b) (9). On October 9, 1957 the petitioner filed a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania. On the same day Judge VAN DUSEN granted the writ and admitted the petitioner to bail. Before hearing, the Sheriff moved to dismiss the writ and on December 9, 1957 this motion was granted. On July 18, 1958 the United States Court of Appeals for the Third Circuit affirmed this action on the opinion below.

Thompson has petitioned this Court for a writ of certiorari to the Court of Appeals. The State of New Jersey submits this brief in accordance with Rule 42(4) in support of the petition in order that the right of approximately 2,000 similarly situated residents of New Jersey to be free of the illegal and perhaps unconstitutional tax and enforcement measures sought to be imposed by the City of Philadelphia may be vindicated.

Summary of Argument

The Buck Act was not a grant by Congress to states and their subdivisions of an affirmative power to tax income earned in federal enclaves. It merely removed a supposed immunity attaching to such income which frustrated otherwise existent power to tax. That this supposition had vitality at the time of the passage of the Buck Act is demonstrable from prior legal history.

The Buck Act should not be construed to authorize any state or its subdivisions to impose a tax on persons or activities with whom it has no contact warranting the imposition of tax. Such a construction would violate substantive due process of law.

The construction of the Buck Act urged by Philadelphia is in diminution of the sovereignty which the United States enjoyed with respect to the Philadelphia Navy Yard prior to the passage of the act. Such statutes should be strictly construed.

Even if the Buck Act grants Philadelphia the power to impose the tax here sought to be collected, which the State of New Jersey denies, it does not authorize it to resort to the collection methods employed here. The act authorizes only collection of an income tax. The petitioner here was arrested by the Sheriff of Philadelphia in the Navy Yard as process to initiate an action for a penalty for non-payment of the tax. The penalty is not commensurate with the tax purportedly due and its payment would not discharge any obligation to pay the tax.

ARGUMENT

POINT I

The Buck Act did not re-cede the sovereign power to tax but merely removed a supposed immunity.

The Buck Act was not a grant by Congress to states and their subdivisions of an affirmative power to tax income earned in federal enclaves. It merely removed a supposed immunity attaching to such income which frustrated otherwise existent power to tax. That this supposition had vitality at the time of the passage of the Buck Act is demonstrable from prior legal history.

The principle of law that the United States and the several States could not tax the income of employees of each

other who were engaged in carrying out "governmental" functions was accepted during almost a century before the passage of the Buck Act in 1940, 54 Stat. 1059, 4 U. S. C., §§106-10. *Dobbins* v. *Commissioners of Erie County*, 41 U. S. (16 Pet.) 435 (1842); *Collector* v. *Day*, 78 U. S. (11 Wall.) 113 (1870); *cf. M'Culloch* v. *Maryland*, 17 U. S. (4 Wheat.) 316 (1819).

That such employees of the United States were "immune" from state income taxation was reiterated as recently as 1937. *New York, ex rel. Rogers* v. *Graves*, 299 U. S. 401 (1937). However, only two years later this Court overruled this settled doctrine. *Graves* v. *New York, ex rel. O'Keefe*, 306 U. S. 466 (1939). There this Court put the reason underlying any immunity of the state and national governments from taxation by each other thus: "[T]he limitation on the taxing power of each [is] such as to forestall undue interference * * * with the governmental activities of the other." 306 U. S. at 477. It found that the tax sought to be imposed by New York on the salary of an employee of the United States after that salary had already been paid into the hands of the employee was so insubstantial an interference with the governmental activity of the United States as not to warrant the denial of New York's power to tax its resident. But in assessing the immunity attaching to *federal* employees, the Court recognized that it did not stem exclusively from constitutional principles implied from the co-existence of the two sovereignties, state and national. Under the "necessary and proper" clause, U. S. Const. Art. I, sec. 8, cl. 18, Congress might grant immunity from state taxation to facilitate federal activities. But Congress had not yet spoken. Recognizing that an affirmative inference may sometimes be drawn from silence, the Court nevertheless concluded that a grant by Congress of an immunity from state taxation was not to be inferred where the interference with the ac-

tivity of the national government was an insubstantial economic burden.

Congress ratified this judgment in the Public Salary Tax Act, 53 Stat. 575, 5 U. S. C. §84a, the same year. Neither this act nor the Court in the *O'Keefe* case treated the question of whether an attempt by the state to exercise taxing jurisdiction over activities occurring within a federal reservation, which it might have in the absence of any immunity (the most typical case of which is taxation of the income of its domiciliaries), would be such an interference with the governmental activity of the United States as to confer upon the federal employees an immunity. There are two expressions in the *O'Keefe* case which afford a basis for such an argument. In commenting on the effect of the "interference" with the activities of the national government caused by the state tax there involved, the Court said that it was "but the normal incident of the organization within *the same territory of two governments*, each possessing the taxing power." (Emphasis added.) 306 U. S. at 487. In a concurring opinion, Justice FRANKFURTER said, "Since two governments have *authority within the same territory*, neither through its power to tax can be allowed to cripple the operations of the other." (Emphasis added.) 306 U. S. at 488. While it may not have been the intention of the Court to imply that there would be a different answer to the question of whether the federal employee was immune, depending upon whether the imposition of tax impinged at all upon the exercise of exclusive territorial jurisdiction of the United States, nevertheless the question was thought by some to have remained open. (Petition, p. 13, n. 8.) The silence of Congress might lead to a different inference than in the *O'Keefe* case, where the only interference with a federal activity was a debatable increase in the cost of federal labor.

To prevent possible incorrect inferences of its intent from silence, Congress passed the Buck Act in 1940, deny-

ing or removing any immunity which might be thought to arise from the bare fact that an activity occurred on a federal reservation, just as in 1939 it had passed the Public Salary Tax Act to validate what the Court had said generally in the *O'Keefe* case, that there was no blanket immunity attaching to federal employees. Both acts are addressed to "any duly constituted taxing authority having jurisdiction." They presuppose jurisdiction to tax (absent an immunity) but do not confer it. The Buck Act states: "No person shall be relieved from liability from any income tax * * * by reason of * * * receiving income from * * * services performed in [a federal] area." 4 U. S. C. §106. The second half of this section in elaboration provides that a state shall have jurisdiction to tax "to the same extent * * * as though [the] area was not a federal area." The section does not say, as it might have, that the state shall have the same power to tax as Congress would have. What the language clearly intends is that Pennsylvania shall have as much power to tax the income of employees working on federal reservations within Pennsylvania as it would have to tax domiciliaries or any other persons over whom it might have jurisdiction who earn income in Delaware. That the second half of the section may be somewhat redundant presents no construction difficulty in the context of the confusion incident to the overruling in the *O'Keefe* case of the very well established precedent of the *Dobbins* v. *Commissioners* line of cases. The Buck Act and the Public Salary Tax Act were adopted to set doubts at rest. Some redundancy is a frequent concomitant of such attempts.

Thus the Buck Act, according to its language and purpose and the legal history leading to its passage, did not confer any jurisdiction to tax nor create any taxable incident cognizable by a state where such did not otherwise exist. Indeed, any such attempt by Congress would raise

most serious constitutional problems. It merely denied or removed an immunity which was frustrating the exercise by the several States of any pre-existing jurisdiction or cognizance of an otherwise taxable incident by states.

POINT II

The Buck Act if construed to permit the levy of a tax on petitioner's income in the Navy Yard would violate substantive due process of law.

The Buck Act cannot authorize Philadelphia or Pennsylvania to levy a tax without an adequate constitutional basis. Such a construction of the Buck Act making it unconstitutional must be avoided. It is one thing to legislate that the federal government in its sovereign capacity has no objection to a tax; it is quite another to extend the taxing power of the states or municipalities beyond constitutional limits. There must be an adequate basis for state or municipal taxation or the tax will be violative of the safeguards of substantive due process of law. See *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340 (1954); *cf. Commonwealth, ex. rel., Luckett* v. *Radio Corp.*, 299 Ky. 44, 184 S. W. 2d 250 (1944).

In this case neither Pennsylvania nor Philadelphia render the petitioner any benefits or services whatsoever. See discussion, *infra*, paragraph (d).

The vast quantum of litigation concerning state jurisdiction to tax despite a claimed exemption because of some foreign connection has led to a development analogous to that in the area of state power to compel foreigners to submit to the jurisdiction of its courts. Today this Court decides the validity of the "jurisdictional grasp" on foreigners not artificially but by weighing the conveniences to the state against the inconveniences to the litigant. Compare *International Harvester Co.* v. *Kentucky*, 234 U. S.

579 (1914), with *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), and *McGee* v. *International Life Ins. Co.*, 78 S. Ct. 199 (1957).

Similarly, in the field of state jurisdiction to tax, the test has become the reasonableness of the imposition of the tax. Compare *Frick* v. *Pennsylvania*, 268 U. S. 473 (1925), with *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340 (1954). *Cf. Hanson* v. *Denckla*, 78 S. Ct. 1228 (1958). In *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1940). Justice FRANKFURTER stated the law to be as follows:

> "The state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax, the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society * * *. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution * * *. [T]he sole constitutional test for a case like the present one * * * is whether property was taken without due process of law, or * * * whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."

The rationale that the burden of taxation may fall on the recipients of its benefits is indisputable. Schools, police protection, sewage disposal and street maintenance are obvious benefits. In the difficult fringe cases courts have searched so as not to overlook remote but constitutionally adequate benefits which justify the exercise of the sovereign power to tax.

None of the authorities may be invoked to sustain the tax before this Court. The following analysis of the remotest as well as the most obvious benefits shows that every possible tie between the petitioner and Philadelphia or Pennsylvania is illusory.

(a) A state may tax where its substantive law governs the transaction upon which the tax is imposed.

Blackstone v. *Miller*, 188 U. S. 189 (1903).

In that case New York was permitted to tax the transfer of a debt on the ground that the validity of the transfer depended on the law of New York. In *State Tax Comm'n* v. *Aldrich*, 316 U. S. 174 (1942), the Court held that Utah could tax the transfer of shares of stock owned by a nonresident in a domestic corporation since Utah law determined the rights represented by the shares of stock though neither the certificates nor the stock transfer records were kept in Utah.

But in the present case, federal law exclusively governs the employment relationship between the petitioner and the Navy. *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558 (1946). In that case the United States had sold an unneeded post office building and had retained legal title for a certain period to insure performance of contractual obligations by the buyer. With the title in this condition, Minnesota sought to tax the property on the ground that under its law the purchaser had title. This Court found it necessary to ascertain the effect of this contract and held that:

> "In determining the meaning and effect of contracts to which the United States is a party, the governing rules of law must be finally declared by this court," 327 U. S. at 564.

See also *United States* v. *County of Allegheny*, 322 U. S. 174 (1944) (collecting cases).

(b) A state may tax a taxpayer's rights where a provision of its law enhances the value of those rights.

State, ex rel., U. S. Sugar Corp. v. *Gay*, 46 So. 2d 165, 168 (Fla. 1950).

In this case the court sustained the imposition by Florida of a tax on a note of a New York corporation secured by a mortgage on Florida lands. Applying the approach which Justice FRANKFURTER had called for in the *Penney* case, *supra*, the Florida court said:

> "It is obvious that the record of a mortgage * * * becomes the generating source of important and definite accessions to the obligation secured thereby. In fact, we think it may be fairly said that the transaction in the instant case would not have been entered into without the security afforded by the mortgage on Florida realty and the protection afforded by their recording statutes * * * relating to the rights of a mortgagee."

In the present case there has been no suggestion of an enhancement of the value of any right or property of the petitioner as a result of the operation of Pennsylvania or Philadelphia law.

(c) A state may tax a transaction if its courts are open to the taxpayer and are peculiarly apt for enforcing the rights under the transaction sought to be taxed.

Greenough v. *Tax Assessors*, 331 U. S. 486 (1947).

In this case the Court sustained the imposition of a tax on the transfer of legal title to a trust *res* of intangibles on the death of the prior trustee even though the beneficiary resided in another state. The Court reasoned that since the trust was administered in Rhode Island, certain

stions concerning it could only be resolved in the Rhode
nd state courts.

t cannot be contended that any court sitting within the
graphical boundaries of Philadelphia or Pennsylvania
eculiarly apt for enforcing the petitioner's rights pur-
nt to his employment contract with the United States
ey. It is, of course, axiomatic that at common law the
ereign was immune from suit by any perosn. Hence,
employee aggrieved by the failure of his sovereign em-
yer to pay wages rightfully due, would have been
rediless. This is not to say, however, that if the monies
re in fact appropriated and available mandamus would
have issued against the appropriate governmental offi-
to require him to pay the salary. The United States
now waived a substantial portion of its sovereign
nunity and is liable on express and implied contracts.
C. J. S. §177 (1955). Suit on such contracts may be
ught (subject to certain jurisdictional limitations not
ein material) in either the federal district court or the
rt of Claims. 28 U. S. C. §§1346, 1491 (1952). If the
is brought in the Court of Claims the action must be
Washington, D. C. 28 U. S. C. §174 (1952). Section
2 of the judicial code provides that so far as district
ts are concerned "any civil action against the United
es [on a contract] may be prosecuted only in the judi-
district where the plaintiff resides." 28 U. S. C. §1402
2). It becomes evident, therefore, that if the action
brought in Pennsylvania, venue would be mislaid.
a case would be transferred to the District of New
ey or dismissed. 28 U. S. C. §1406 (1952). In any
t, since the acts of Congress waiving sovereign im-
ty have not given jurisdiction to the state courts, the
could not be brought in the Pennsylvania courts.

Even if petitioner recovered judgment in a suit against
United States, he could not proceed to satisfy it

through the use of any court's process in Pennsylvania since the United States is exempt from levy and execution; rather, he would have to look to the general accounting office which is under the direction of the Comptroller-General for settlement. 28 U. S. C. §§ 2414, 2517 (1952). Should the Comptroller refuse to pay the judgment, mandamus could be obtained against him. *Citizens Bank and Trust Company* v. *United States*, 240 F. 2d 863 (D. C. Cir. 1956), cert. denied, 355 U. S. 825 (1957); *Hines* v. *United States, ex rel., Marsh*, 105 F. 2d 85 (D. C. Cir. 1939). This action, however, would be cognizable only in the United States District Court in the District of Columbia and not elsewhere. Note, 70 Harv. L. Rev. 350, 363 (1956); see *Alley* v. *Craig*, 97 F. Supp. 576, 577 (D. Me. 1951) (mandamus is "a remedy not within the jurisdiction of the district courts; excepting only the district court for the District of Columbia").

(d) A state may tax the right of a person where it provides the conditions of an orderly society without which the owner could not acquire the right, *Travis* **v.** *Yale & Towne Mfg. Co.*, **252 U. S. 60 (1920), or where the state protects a person whose activity is necessary for the transfer of a right to the taxpayer,** *Curry* **v.** *McCanless*, **307 U. S. 357 (1939) (*held* that Alabama, the domicile of the trustee, might tax the transfer of intangible assets of the trust passing under the will of a Tennessee domiciliary), or, in the case of an income tax, where the state provides that fundamental protection to the person which is rendered by the state of domicile and which is the *sine qua non* of the enjoyment of any right,** *Guaranty Trust Co.* **v.** *Virginia*, **305 U. S. 19 (1938).**

No argument can be made that any of these three grounds for taxation exist in the present case. The petition for *habeas corpus* alleges that the Navy Yard is used "solely

and exclusively as a shipyard for building, servicing, and maintaining ships of war and other vessels and equipment of the United States Navy."

Since the district judge gave judgment against the petitioner without hearing, on this state of the record the allegation must be taken to be that Philadelphia renders no service inside the area of the Navy Yard. Even if an eventual development of the facts would show that Philadelphia renders certain services such as the supply of water on a contractual basis with the United States, this is not analogous to the case of taxation of the income of non-residents by the state of performance of the services giving rise to wage claims. While as a matter of contract the Navy may permit the city to supply certain services, since the federal government has exclusive jurisdiction the city or state may be excluded and hence neither the city nor state acts as a matter of sovereignty. "'Sovereignty' * * * imports the supreme absolute, uncontrollable power by which any State is governed." *Paulus* v. *South Dakota*, 58 N. D. 643, 227 N. W. 52, 54 (1929), quoting *Cooley, Constitutional Limitations* 1 (7th ed. 1919). See *Chisholm* v. *Georgia*, 2 U. S. (2 Dall.) 419 (1793); *Union Bank* v. *Illinois*, 43 Tenn. (3 Cold.) 325 (1866). Taxing jurisdiction cannot be vested on the basis of contractual privity with the federal government. See *Miller Bros. Co.* v. *Maryland*, *supra*, where it was held that Maryland could not impose on a Delaware seller the duty to collect a tax validly imposed on the buyer for the use in Maryland of the item sold. It is well settled that a tax may not be enforced unless it is sought to be collected as a matter of sovereign right. See *O'Byrne* v. *Mayor and Aldermen*, 41 Ga. 331 (1870).

(e) A state may not tax tangible personal property stored in another state even though owned by a domiciliary of the taxing state.

Frick v. *Pennsylvania*, 268 U. S. 473 (1925).

The reason for the decision is that a state is justified in taxing property only where it affords some protection to the property. In the present case there is no personal property sought to be taxed, and therefore, the *Frick* rule, impliedly approving taxation by the state in which the property is physically located, has no application. As discussed above, neither Philadelphia nor Pennsylvania extend any protection to the petitioner's intangible right to income.

The present case, in summary, presents the Court with a picture of a taxing authority ignoring the fundamental requirement that it must have some connection to the taxpayer or his property. While there is no doubt that the courts have expanded the concept of "jurisdiction" to tax, nevertheless, due process of law must still have vitality in this field. See *Miller Brothers Co.* v. *Maryland*, *supra*; *cf. Commonwealth, ex rel. Luckett* v. *Radio Corp.*, *supra*. The Court cannot deny the petitioner's due process objection unless it holds that the mere fact that an atlas would show the Navy Yard within Philadelphia is a sufficient basis to tax. In this case not one of the characteristics normally flowing from physical contact with an area exists. To sustain Philadelphia in this case is to fix tax liability on a fiction, incompatibly with due process of law.

POINT III

The Buck Act is not authority for enforcement of a penalty action, arising out of a tax liability, against a federal employee employed on federal territory and a non-resident of the state or municipality seeking to exact the penalty.

The *writ capias ad respondendum* executed against the petitioner George E. Thompson was not sanctioned by the Buck Act. The *capias* was not used as a mere civil process initiating an action to collect the alleged tax liability giving rise to the action. To the contrary, the *capias* was used to initiate a penalty action for $100.00 for each year in which no tax return was filed. This statutory penalty is fixed without reference to the amount of taxes allegedly owed and its payment would not discharge the obligation of the tax.

If it is assumed, contrary to the argument in Points I and II, *supra*, that the Buck Act affirmatively granted new taxing power to the states and their subdivisions without offending the Constitution, nothing in the act explicitly permits states or their subdivisions to enforce penalties within federal territory. Even a broad construction of the word "collect," to permit the execution of a civil arrest to guarantee the appearance of the petitioner to appear in a suit to collect the tax itself if state law allowed,* would not warrant the action of the Sheriff of Philadelphia in the present case. The arrest here was the initiating process in an action to collect a penalty not measured by the tax and whose payment would not discharge the obligation of the tax. The distinction between taxes and penalties is

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* Pennsylvania law forbids resort to the process of arrest to initiate an action of debt for the tax itself. Rule of Civil Procedure 1481(a); (b) (9).

entirely clear, as Congress undoubtedly understood. For example, in *United States* v. *United States Industrial Alcohol Co.*, 103 F. 2d 97 (4th Cir. 1939), an action for taxes due from a distiller who illegally diverted its alcohol into the beverage market during prohibition, the defendant's argument that the tax was really a penalty failed. The Court held that Congress could validly tax alcohol illegally used at a higher rate than alcohol consumed legitimately and that this differential was not a penalty. Hence repeal of the prohibition laws could not abate the action which was predicated on the Revenue Act of 1926. See also *Liberia* v. *Nee*, 10 F. Supp. 336 (N. D. Fla. 1935); *Burlington County* v. *Martin*, 128 N. J. L. 203, 25 A. 2d 17 (Sup. Ct. 1942); *Walsh* v. *School District*, 343 Pa. 178, 22 A. 2d 909 (1941); *Young Men's Christian Ass'n* v. *Philadelphia*, 323 Pa. 401, 187 Atl. 204 (1936); *cf. United States* v. *Kahriger*, 345 U. S. 22 (1953).

Under recognized principles of statutory construction, the Buck Act cannot be construed as impliedly permitting the execution of the *capias* to collect penalties. Since it explicitly permits collection of a tax, the failure to provide for the collection of a penalty and the execution of process to this end indicates an intent to foreclose these possibilities. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62 (1956), is persuasive in this regard. There, the Supreme Court of Louisiana had enjoined certain peaceful picketing by the defendant union. It was quite clear that ordinarily the picketing would have been protected conduct under the National Labor Relations Act. The action of the state court was defended on the ground that since the union had failed to file a non-communist affidavit with the N. L. R. B. and further had neglected to file organizational data with the Secretary of Labor, it had waived its rights in this regard. This Court, holding that since the consequences of noncompliance were specifically enumerated but

did not include that sought to be invoked in the state courts, reversed the judgment below and denied any expansion of the listed sanctions. See also, *United States* v. *Arredondo*, 31 U. S. (6 Pet.) 691, 741 (1832).

In Point I, *supra*, it has been shown that the Buck Act and the Public Salary Tax Act, upon which Philadelphia bases its action in the present case, recognized the development of case law which, appraised pragmatically, vested in the states and their subdivisions a broadened power to tax. Thus, the theory of *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550, 562 (1892), is applicable: "The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchise or privilege in which the government or the public has an interest (citing cases). Statutory grants, of that character, are to be construed strictly in favor of the public, and whatever is not unequivocally granted is without; nothing passes by mere implication." See also *Parrack* v. *Ford*, 68 Ariz. 205, 203 P. 2d 872 (1949).

Application of the above rules of statutory construction is well demonstrated in *The Queen* v. *The Churchwardens*, 1 App. Cas. 611 (H. L. 1876). In the *Churchwardens* case the House of Lords was concerned with an act by a superior authority vesting a power to levy and collect taxes in an inferior authority. Parliament had provided that the churchwardens of any parish could be lent money by the Public Works Loan Commissioners for purposes of ecclesiastical construction. The churchwardens were required to levy and collect taxes to repay the loan within 20 years. Pursuant to this authority, the wardens of Wigan Parish sought and obtained a loan and made appropriate repayments for 4 years. Thereafter, the churchwardens defaulted and the Commissioner secured a writ of mandamus from the Queen's Bench, requiring them to levy

the taxes and make repayments. On appeal, the House of Lords reversed the decision of the trial court on the ground that the mandamus was issued 21 years subsequent to the time of the loan. The Law Lords ruled that when Parliament gives one subdivision the power to lend money to another which is, in turn, empowered to levy taxes to repay the loan, the statutory grant must be strictly adhered to; hence, since the statute provided that the loan must be repaid within 20 years, there was no authority on behalf of the Commissioners to secure the mandamus subsequent to that time.

In the case on appeal here, there is a similar situation. Philadelphia, powerless to act without appropriate federal acquiescence, has in effect been granted "jurisdiction and power to levy and collect" an income tax under certain circumstances. It has not been granted any power to levy, much less execute, a penalty within the federal district for non-payment of the tax. Under these circumstances, the action of the sheriff is beyond any authority granted by the Buck Act.

Howard v. *Commissioners of Sinking Fund*, 344 U. S. 624 (1953), sustains this construction. In the *Howard* case, employees in the Naval Ordnance Plant in Louisville sought to avoid the local "occupational tax or license fee" on the ground that while the Buck Act permitted "income taxes" that term could not be fairly construed to include the tax in question. Even though seven members of the Court disagreed with the appellant's argument on the facts involved, it is perfectly clear that the entire Court required the tax to bear some relationship to net income, gross income or gross receipts. The penalty sought to be inflicted on the petitioner Thompson here fails to satisfy the *Howard* test for two reasons: (1) it is not a tax at all, and (2) it is unrelated to net income or gross income or receipts.

The City of Philadelphia cannot urge that the reservation of power to serve civil and criminal process in the cession act (Act of April 4, 1866, P. L. 96) extended this far. The cession act conferred no power to enforce a penalty for non-payment of a tax on the wages earned by a non-resident in the Federal Navy Yard. See *Fort Leavenworth R.R. Co. v. Lowe, supra.* The cession act must be strictly limited to its terms. No substantive liability for a penalty arising from non-payment of taxes was fixed by the cession act. Whether constitutionally feasible or not (see Point II, *supra*), the cession act, as well as the Buck Act, failed to vest jurisdiction in the City of Philadelphia to impose penalties for the failure to file returns or to pay municipal taxes on income earned by New Jersey residents working for the federal government on the federally acquired naval reservation on League Island.

CONCLUSION

The State of New Jersey respectfully urges this Court to grant the petition of George E. Thompson for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

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